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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5364

DARNELL BROWN,

Petitioner,

v.

LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Louisiana Supreme Court rendered May 21, 1979 and entered on the same date, affirming the petitioner's conviction is located in the Appendix of this case, reported in 371 So.2d 746 (La. 1979).

BASIS OF JURISDICTION

The petition for rehearing was denied June 25, 1979. A petition for writ of certiorari was filed on September

17, 1979, and was granted by this court on December 10, 1979. Jurisdiction of this Court lies under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

QUESTION PRESENTED

Whether the United States Supreme Court decision in *Burch v. Louisiana,* ___ U.S. ___, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), striking down a state statute allowing convictions by nonunanimous six-person juries, is to be applied fully retroactively, or at least on review of a State criminal conviction not yet final at the time the *Burch* decision was handed down.

STATEMENT

On July 22, 1978 at 10:00 a.m. the house located at 2930 Florida Avenue, New Orleans, Louisiana was allegedly broken into by the defendant. Kenella Dixon, who lived in the other half of this double at 2932 Florida Avenue, heard some noises and called the police.

Following a police investigation, Darnell Brown was apprehended.

The State of Louisiana charged petitioner with violations of Louisiana revised statutes 14:62 and 15:529.1, relative to the offenses of simple burglary and being a multiple offender, respectfully. A Bill of Information was filed July 31, 1978 charging petitioner with simple burglary. Before trial, petitioner filed a Motion to Quash the Jury pursuant to Louisiana Code of Criminal Procedure Article 532(9). The trial court denied this motion. On August 23, 1978 defendant was tried before a six-person jury. After a polling of the jury, the verdict was entered 5-1, guilty as charged.

On August 30, 1978 petitioner appeared with counsel before the trial court and argued for a Motion for a New Trial, which was based on the illegality of the jury size. The trial court denied this Motion. Petitioner next filed a Motion to Quash the Multiple Bill which the State had filed August 23, 1978. This motion was denied. Defendant pled guilty as charged to a violation of Louisiana Revised Statutes 15:529.1 (the multiple offender law). The Court sentenced petitioner to serve 22 years at hard labor in the custody of the Louisiana Department of Corrections with credit for time served.

Petitioner, through his counsel, filed a Motion for Appeal. The Louisiana Supreme Court affirmed petitioner's conviction and sentence on May 21, 1979. Petitioner applied for a rehearing based on Assignment of Error No. 1, which involved petitioner's Motion to Quash the Jury. The Louisiana Supreme Court denied this rehearing application on June 25, 1979, thus maintaining the *Burch* rule would not be applied retroactively.

ARGUMENT

THE UNITED STATES SUPREME COURT DECISION IN *BURCH v. LOUISIANA*, ___ U.S. ___, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), STRIKING DOWN A STATE STATUTE ALLOWING CONVICTIONS BY A NONUNANIMOUS SIX-MEMBER JURY, SHALL BE APPLIED RETROACTIVELY.

The bill of information in this case charged the defendant, Darnell Brown, with a violation of La. R.S. 14:62, relative to the offense of simple burglary. In Louisiana, the right to a jury trial attaches in all criminal offenses punishable by more than six months imprisonment. If an offense is not necessarily punishable at hard labor, the jury is composed of six persons. Article 1, Section 17, La. Constitution of 1974; La. Code Criminal Pro., Art. 779. A jury of six persons found the defendant guilty as charged, the verdict being five to one.

In affirming defendant's conviction by this six-person jury, the Louisiana Supreme Court found that Assignment of Error No. 1, which involved defendant's motion to Quash the Petit Jury on the grounds that statutory provisions permitting less than a unanimous vote for conviction in six-person juries violated due process rights, dealt with a question of retroactivity. The Louisiana Supreme Court correctly noted that the United States Supreme Court had recently ruled that convictions by a nonunanimous six-member jury in a state criminal trial for a non-petty offense deprives an accused of his constitutional right to trial by jury. *Burch v. Louisiana*, ___ U.S. ___, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979). After so noting, the Louisiana Supreme Court stated: "the question presented in this assignment is whether *Burch*, supra, is to be applied retroactively. We think not." *State v. Darnell Brown*, 371 So.2d 746, at 748 (La. 1979).

This ruling fails to note the criteria set-up by the United States Supreme Court concerning the issue of retroactivity. Upon considering the circumstances of a particular situation, a Court may determine whether an overruling decision should be given:

1) purely prospective effect, so as not even to apply it in the case in which it is announced;

2) limited retroactive effect, so that the new rule will govern the rights of the parties to the overruling case itself, but the old rule will govern the rights of parties to all other pending litigation as well as litigation terminated by "final"[1] judgment;

3) limited retroactive effect, so that the new rule will govern the rights of the parties to the overruling case and the right of parties to other cases which were pending when the overruling case was decided, but the old rule will govern the rights of parties to cases terminated by a "final" judgment prior to the time the overruling case was decided;

4) general retroactive effect, so that the new rule will apply even where "final" judgments had been obtained at the time the overruling case was decided as well as to apply in the case in which it is announced and in other cases pending at the time of the announcement of the new rule.

Defendant strongly contends that the rule announced in *Burch* fits in the fourth category; or, at least, the third category. A three-step thought process points to this conclusion. First, an overview of the jurisprudence of

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[1] "Final" here, and throughout this brief, refers to a judgment as to which the ordinary methods of review, such as appeal or certiorari, have already been exhausted or the right to utilize them has expired through passage of time.

retroactivity supplies necessary background on relevant issues.[2] Second, the *Burch* rule, which concerns the right of an accused to trial by jury under the Sixth and Fourteenth Amendments, necessitates a detailed analysis of how the United States Supreme Court has treated the retroactive issue in past Sixth Amendment right to jury trial rulings. Finally, the criteria discovered in steps one and two must apply to the present situation. Throughout this process, basic questions and problems of past practices regarding this retroactivity issue crop up. Such manifestations deserve special discussion. The resultant conclusion leads to full retroactive effect of the *Burch* rule; or, at least to limited retroactive effect, so that the *Burch* rule will govern defendant's rights in the present case, since his case was pending when *Burch* was decided.

In *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), the United States Supreme Court rendered its first decision holding a previous constitutional ruling not to be wholly retroactive. The Court held the *Mapp* exclusionary rule was inapplicable to cases in which the conviction had become final before the date *Mapp* was handed down. Since this case, significant evolution in the Court's thinking on the subject has occurred, but all questions relating to the scope and application of the concept, it is fair to say, have not as yet been settled. Nonretroactivity has not met with uniform acceptance; a shifting minority of the Court's members have expressed opposition to or at least reservations about the doctrine.

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[2] For a detailed discussion of relevant cases, *see* Ten Years of Nonretroactivity: A Critique and Proposal, 61 Va. L.R. 1557 (1975), and *Supreme Court Decision-Retroactivity,* 22 L.Ed.2d 821 (1969).

In *Linkletter,* the Court began to identify the factors relevant to determining whether a particular decision should be given retroactive effect. The Court noted it must look to the prior history of the new rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation. Also, the Court discussed three then-recent law-changing decisions which had been given full retroactivity, *Griffin v. Illinois,* 361 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 89 (1956); *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); and *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). The Court referred to a factor that was to occupy a central role in the development of standards for determining retroactivity. In the above three cases, the legal principle established went to the fairness of the trial—the very integrity of the fact-finding process. The Court did not find this consideration applicable in *Linkletter* even though the case rule had already been applied to cases on direct review.

In holding new rules pertaining to custodial interrogation were not retroactively applicable in *Johnson v. New Jersey,* 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 (1966), the Court noted that whether a constitutional rule did or did not enhance the reliability of the fact-finding process at trial was necessarily a matter of degree. Also in this case, the Court refined the definition of non-retroactivity. Disdaining any distinction between cases on direct review and those involving convictions that had become final by the date of the law-changing decisions, the Court found that the reliance and effect factors called for an application of the new rules only to trials begun after the standards were announced. Thus, *Johnson* moved the Court significantly beyond *Linkletter* and much closer to an approach of pure

prospectivity through eliminating application of the doctrine only to cases pending on direct review.

In *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), the United States Supreme Court clearly stated the considerations that affect the judgment whether a case reversing prior doctrines in the area of the criminal law should be applied only prospectively:

1) the purpose to be served by the new standards;
2) the extent of the reliance by law enforcement authorities on the old standards; and
3) the effect on the administration of justice of a retroactive application of the new standards.

Once again, moreover, the Court in *Stovall* noted that for purposes of deciding the issue of retroactivity, no distinction was justified between final convictions and convictions at various stages of trial and direct review. In denying retroactive effect to new rules involving identification at police lineups, the Court determined the facts of reliance and burden were entitled to such overriding significance as to make the above distinction unsupportable. The wisdom of limiting the retroactive application of a new rule so as to give the rule such effect in only the case in which the rule is announced has, however, been questioned in many dissenting and concurring opinions. *Mackey v. United States*, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring); *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting); *Williams v. United States*, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971) (Marshall, J., concurring in part and dissenting in part); *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53

L.Ed.2d 306 (1977) (Marshall, J., concurring and Powell, J., concurring).

Thus, the United States Supreme Court set up the *Stovall* criteria to act as guidelines to resolve the retroactivity issue. Using these guidelines, the United States Supreme Court has "held to the course that there is no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity for decisions construing the broad language of the Bill of Rights."[3] *Williams v. United States*, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971). This Court has noted that each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice. Going further, the way in which these factors combine must inevitably vary with the rule involved, so as to require that the issue of retroactivity be determined in each case by looking to the peculiar traits of the specific rule in question. *Johnson v. New Jersey*, supra.

In the latest retroactivity case, *Hankerson v. North Carolina*, supra, the United States Supreme Court followed its setting up of a hierarchy among the nonretroactivity criteria with the foremost factor being the purpose to be served by the new rule. In concluding the *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), rule, requiring States to establish all elements of a criminal offense beyond a reasonable doubt, should be given retroactive application, the United

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[3] *See* footnote 3 of *Williams v. United States*, supra, for a list of cases and sources dealing with the retroactivity issue. To list every case where retroactivity or nonretroactivity was applied would prove too burdensome.

States Supreme Court reiterated a principle previously announced in *Ivan V. v. City of New York*, 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972), and *Williams v. United States*, supra:

> While in deciding whether a new constitutional rule is to be applied retroactively it is proper to consider the state's reliance on the old rule and the impact of the new rule on the administration of justice if the degree to which the new rule enhances the integrity of the factfinding process is sufficiently small; where the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule is given complete retroactive effect.

Thus, in applying the *Stovall* criteria, the Court must first look to the purpose of the new constitutional doctrine. If such purpose enhances the integrity of the factfinding process, complete retroactivity applies.[4] If this issue is close, then the Court proceeds to the remaining criteria of reliance and effect. Before applying the criteria to the new constitutional ruling in *Burch*, this new ruling requires an inquiry of how the Court has viewed the retroactive issue in past Sixth Amendment right to jury trial rulings. This necessity arises since the *Burch* ruling originated in the Sixth Amendment right to a jury trial.

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[4]Examples of such findings included *Hankerson v. North Carolina*, supra; *Ivan V. v. City of New York*, supra; *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1921, 20 L.Ed.2d 1100; and *Berger v. California*, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969).

In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the United States Supreme Court established new rules for the composition of juries in capital cases. The Court in footnote 22, rejected the losing party's plea for pure prospectivity finding full retroactivity appropriate despite considerations of reliance and effect. The Court noted the jury selection standards employed in violation of the new rule necessarily undermined the very integrity of the process which decided an accused's fate.

The Court denied retroactive effect to new rules guaranteeing the right to be tried by a jury rather than by a judge. In *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), the Court noted the values implemented by the right to jury trial would not be served by retrying all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. In denying the *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), rule retroactive effect, the Court applied the *Stovall* criteria. *Duncan*'s purpose for jury trials generally tends to prevent arbitrariness and repression, but the Court stated that not every criminal trial or any particular trial held before a judge is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. The Court found good faith reliance upon past Court opinions to the effect that the Sixth Amendment right to jury trial was not applicable to the States. Finally the Court found the impact on law enforcement and the administration of justice to be significant since denial of jury trials had occurred in large numbers.

DeStefano also ruled that the *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), rule, which extended the right to jury trial to include trials

for serious criminal contempt, is not to be applied retroactively. After noting the considerations are more evenly balanced with regard to this rule as opposed to the *Duncan* rule, the Court applied *Stovall.* The purpose factor proved very close. One ground for *Bloom* was the belief that contempt trials would be more fairly tried if a jury determined guilt. Unlike the judge, the jury will not have witnessed or suffered the alleged contempt, nor suggested prosecution for it. The Court, however, pointed out that the tradition of nonjury trials for contempt was more established than .the view that States could dispense with jury trials in normal criminal prosecution. Thus, reliance on past cases overturned by *Bloom,* was more justified. Also, the adverse effects on administration of justice would be substantial.

The Court in *Gosa v. Mayden,* 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973), held non-retroactive the earlier decision in *O'Callahan v. Parker,* 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), that persons in the armed forces are entitled to a civilian trial for offenses that are not service-connected. Applying the *Stovall* criteria, a plurality opinion noted that the fact that a new judicial rule tends incidentally to improve or enhance the reliability of the truthfinding process does not in itself mandate the rule's retroactive application. Going further, the Court emphasized retroactivity is not required by a determination. The old standard was not the most effective vehicle for ascertaining the truth, or that the truth-determining process has been aided somewhat by the new standard, or that one of several purposes in formulating the new standard was to prevent distortion in the process.

In concluding the purpose behind the rule enunciated in *O'Callahan* does not mandate retroactivity, the Court

stated that although *O'Callahan* was critical of the military system of justice, and stressed possible command influence and the lack of certain procedural safeguards, the decision there "certainly was not based on any conviction that the court-martial lacks fundamental integrity in its truth-determining process." In concluding the reliance factor favors prospectivity, the Court absolved the military as not to be faulted for its reliance on the law as it stood before *O'Callahan* and for not anticipating a clear break with the past. Finally, the Court concluded the effect on the administration of justice would be substantial.

In *Daniel v. Louisiana,* the United States Supreme Court, per curiam, ruled the *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), rule, that exclusion of women from jury venire deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross-section of the community, is not to be applied retroactively. After citing *DeStefano v. Woods,* supra, the Court applied the three *Stovall* factors. The Court found the purpose to be served by this new standard, as in *Duncan,* concerned the function played by the jury to prevent arbitrariness and repression. The Court concluded this purpose did not rest on the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with the Sixth Amendment. In *Taylor,* the Court stated:

> "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular compo-

> sition [citations omitted]; but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."

Taylor was not so much concerned with the actual make-up of a particular jury, as with the opportunity for women to be empaneled on a jury. Thus, not every criminal trial or any particular trial held before a jury whose jury venire did not discriminate against women is unfair or any particular trial held before such a jury may never be as fairly treated by such a jury as he would be by a jury venire which had discriminated against women.

Thus, when dealing with a retroactive issue for rulings arising out of the Sixth Amendment's right to a jury trial, the United States Supreme Court characteristically applies the *Stovall* criteria. When the purpose to be served by the new standard goes to the heart of the truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the Court applies the new ruling retroactively—as in *Witherspoon v. Illinois,* supra. When this first criteria presents a close issue, the Court considers the remaining two criteria—as in *DeStefano v. Woods,* supra; *Gosa v. Mayden,* supra; and *Daniel v. Louisiana,* supra. In each of these cases, the Court based its nonretroactive decision on the general purpose of the right to jury trial tending to prevent arbitrariness and repression without going into the inner, more specific, operations of a particular jury. The Court hinted at this more narrow consideration in *Witherspoon,* stating jury-selection standards could undermine the integrity of the guilt-determining process. This leads to the third and final step in the thought process which leads to a retroactive application of the *Burch* ruling.

In the present situation, the United States Supreme Court clearly states the purpose of its decision in *Burch v. Louisiana,* supra:

> However, much the same reasons that led us in *Ballew* to decide that use of a five member jury threatened the fairness of the proceeding and proper role of the jury, lead us to conclude now that conviction for a non-petty offense by only five members of a six person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six person juries to be unanimous.

This *Burch* rule greatly enhances the integrity of the factfinding process by preserving the substance of the jury trial and the uprightness of the guilt-determining conduct (as was found in *Witherspoon v. Illinois,* supra). This new rule raises serious questions concerning the accuracy of guilty verdicts in past trials. The Court in *Burch* relied on *Ballew v. Georgia,* 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978). The Court in *Ballew* held the purpose and functioning of the jury in a criminal trial is seriously impaired to a constitutional degree by a reduction in size below six members. In so concluding, the Court went beyond considering only the general purpose of jury trials of preventing arbitrariness and repression, and delved into the more specific operations and functioning of a jury. The Court drew on five specific concerns. First, recent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberations. Second, the data raises doubts about the accuracy of the results achieved by smaller and smaller panels. Third, the data suggests the verdicts of jury deliberation in criminal cases will vary as juries become smaller; and that the variance amounts to an imbalance to the detriment of one side, the defense.

Fourth, the data suggests the minority viewpoint will adhere to his position more frequently when he has at least one other person supporting his argument, which foretells problems not only for jury decision making, but also for the representation of minority groups in the community. Fifth, several researchers have identified methodological problems tending to mask differences in the operation of smaller and larger juries.

These narrow concerns lead to one conclusion—as the jury size decreases, the reliability of the jury decreases along with the accuracy of a guilty verdict. Thus, to improve this accuracy the Court in *Ballew* struck down five-person juries; likewise the Court in *Burch* struck down nonunanimity in six-person juries. The Court, in these two cases, recognizes the general jury trial purpose as opposed to a judge trial; but, the Court recognizes more specific purposes linked to the workings and deliberations of a jury trial which need to be considered once an accused chooses the jury trial over a judge trial. As *Ballew* and *Burch* point out, these specific purposes originate in the Sixth Amendment. Thus, the first, and foremost, criteria points toward retroactive application in the present situation.

Although the United States Supreme Court has not formally ruled on the retroactivity issue concerning the rule announced in *Ballew*, the Court has, in effect, applied *Ballew* retroactively. In *Robinson v. Georgia*, 435 U.S. 991 (1978), where defendant raised the jury size issue, the United States Supreme Court vacated the lower court's judgment and remanded the case in light of *Ballew v. Georgia*, supra. Since the Court is willing to treat *Ballew* retroactively, then the Court must be willing to treat *Burch* retroactively since *Burch* relied on *Ballew*'s rationale.

The final two considerations also point towards retroactive application of the *Burch* rule. Although law enforcement authorities may have relied on authority for nonunanimous verdicts, petitioner contends *Ballew v. Georgia*, supra, and *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), clearly foreshadowed in holding in *Burch*, thus obviating any good faith reliance. Finally, the effect on the administration of justice would be small. The Court in *Burch* pointed out only two states had previously allowed nonunanimous six-person juries. Within these states, the issue raised here would be moot in all convictions rendered by a 6-0 verdict. Also, most cases tried before six-person juries in Louisiana usually do not merit long prison terms. Thus, most defendants who were improperly convicted have probably served their terms and left prison. Unfortunately, no Louisiana State Agency compiles statistics on the needed information. Therefore, there is no method of accurately determining how many prisoners this opinion will affect.

It is impossible, in the present situation, to guage the precise effect of a retroactive ruling, but States have no justifiable interest in convicting the innocent, or in overriding the defendant's right to a trier of fact who will carefully weigh and scrupulously balance every item of proof. In any event, if the Court must decide between fundamental constitutional rights and administrative convenience, surely constitutional rights should go wrongly to jail.

Even if the Court applies the ruling in this case prospectively, the petitioner here should be afforded the benefit of the rule. There is no equitable consideration which should impel the Court to distinguish among the litigants whose cases serve as the vehicle to adjudication

of a new rule of constitutional law. Every party whose case is involved, including those whose cases were not final at the time of the new ruling, should be treated alike. Thus, cases still pending on direct review should receive full benefit of the Court's supervening constitutional decision. In the present case, petitioner's conviction was not yet final when the United States Supreme Court handed down its opinion in the *Burch* case. That opinion is dated April 17, 1979, whereas the Louisiana Supreme Court didn't affirm petitioner's conviction until May 21, 1979. This raises the basic question of why should the Constitution mean one thing to the defendant in *Burch* and another to the present petitioner, particularly when both litigants are situated similarly in all pertinent respects.

Petitioner submits the answer to this question lies in the fact the situation in the present case points towards full retroactivity of the rule handed down in *Burch v. Louisiana,* supra. The Louisiana Supreme Court erred in not so ruling.

CONCLUSION

It is respectfully requested that the ruling handed down by the Louisiana Supreme Court in *State v. Darnell Brown,* 371 So.2d 746 (1979), be reversed. Thus, the rule announced in *Burch v. Louisiana,* supra, striking down a state statute allowing convictions by a nonunanimous six-person jury, should be given full retroactive

effect. If this Honorable Court is unwilling to give full retroactive effect to this ruling, it is respectfully requested this ruling should apply to the petitioner's case and all cases which have not yet become final which raise this same constitutional issue.

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